

*Broadband Authority and the Illusion of Regulatory Certainty*

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Good afternoon.

Thank you for that kind introduction, Patrick. It is a pleasure to be with you all here today to talk about what is truly a fascinating time for those involved and interested in our Nation's telecommunications policy. We have come a long way in the last 75 years, and the next two or three years alone might rival our entire communications history to date. There is a lot on our agenda. We have broadband to make available to all Americans at competitive speeds and affordable prices. We have to take a fresh look at our approach to allocating and managing spectrum. We have to account for a rapidly changing media environment as we tackle questions of ownership, large-scale mergers, and retransmission consent.

I know these are just a few of the issues in which you all here – especially the Media Institute – have a great deal of interest. And believe me, I would enjoy talking about any one of these challenges. But I will save those issues for another day.

The reality is that I don't think I could be a responsible and responsive public servant if I failed to offer some thoughts on what has to be the most heavily lobbied and currently watched item on our plate: classification of broadband services. While some may consider this topic unsafe, even perilous, I figure that if I can survive a meeting with 30-plus Wall Streeters on the subject a couple of weeks ago, then I have developed the Title II calluses necessary for a friendly lunch on the subject with you all today.

I have made it no secret that I generally support the Chairman's Title II-Forbearance hybrid proposal. To me, it makes sense given the hand we were dealt by the D.C. Circuit back in April, and it is the most efficient and least burdensome way to expeditiously address some of the most pressing challenges in the telecommunications sector today. To me, setting up a regulatory regime that mirrors what we currently have in the wireless setting is wise and has been lauded by Democrats and Republicans alike over the years.

My aim today is to examine three of the more prominent arguments that have been levied publicly against the Chairman's recent proposal. In particular, I focus the majority of my energy on what I find to be one of the more confusing claims; namely, that the Chairman's plan creates a new wave of regulatory uncertainty in the marketplace.

But before I dive right in, I want to affirm to you that I am first and foremost a steward of the public interest. I take this role very seriously. I do not believe the Commission is here merely to regulate interference disputes or to process licensing applications. Rather, I believe that we exist to foster a telecommunications space that is vibrant, that encourages investment and innovation, and that protects and empowers consumers. To do this, we must make hard choices. We must look beyond our cozy relationships with the people – sometimes our friends – who represent the companies we

regulate. And above all, we must understand that there are real people at the end of every decision we make, and those are the people who we are ultimately here to serve.

I also believe that often the goals of innovation, investment, competition, diversity, and consumer protection are in harmony. But sometimes, that balance is thrown out of whack. Sometimes it is clear that certain incentives for business put industry at odds with what is best for consumers as a whole. And at those points, any responsible public servant must be ready to act.

### **The Theories of Harm**

Over the past few weeks I have heard a number of different theories as to why the Commission should not reclassify broadband connectivity as a “telecommunications service.” According to my crack research team, the three leading themes that appear to have emerged are: (1) the FCC should not embrace an old-style regulatory model created in the first-half of the 20<sup>th</sup> Century for monopoly voice networks; (2) there has been no so-called “market shift” that is allegedly necessary to trigger the ability for the Commission to reclassify; and (3) what I will spend most of my time addressing today, that reclassification as described by the Chairman would create a new and lethal “regulatory uncertainty.”

The first criticism is easily dismissed. It is simply false on its face. It is clear from the Chairman’s announcement that the entire point of his approach is to avoid applying any such old-world rules. Under the Chairman’s view, without forbearance there is no reclassification. You cannot have one without the other. Think peanut butter and jelly. Salt and Pepper. Batman and Robin. You get the picture.

The Commission is not seeking to employ burdensome rules for broadband from a day which has long passed. Rather, the Chairman is proposing that we re-establish the authority that the Commission and most observers thought we had as of the 5<sup>th</sup> of April, that bright and sunny day prior the D.C. Circuit’s decision in the *Comcast* case. The proposal is thus not a power grab. It’s not a return to days of yore. The Chairman means what he says: our aim is merely to see the Broadband Plan through and to preserve the open character of the Internet. The Court’s determination tied our hands about how to go about achieving this; we now have a limited but clear path to attain our modest but essential goals.

The second theme I have heard frequently is the claim that the Commission cannot reclassify the transmission component of broadband because we have not undergone a “significant market shift.” More specifically, a recent *Washington Post* editorial stated that “[w]hile agencies have broad latitude in reevaluating regulatory schemes, reversals should be linked to significant market shifts.”<sup>1</sup>

First, as a simple matter of administrative law, there is no such requirement. It does not take a lawyer to understand that. The Supreme Court’s language in last year’s *Fox* decision is unambiguous on this point:

[O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons

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<sup>1</sup> Editorial, Why broadband regulation needs help from Congress, Wash. Post, May 24, 2010, at A18.

for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.<sup>2</sup>

The long and the short of it is that the Commission must simply provide a reasoned justification and not simply change course without explanation. It need not demonstrate some broad market shift in the process. The Court left the politics to the political branches.

Even putting the legal aspects aside, if the D.C. Circuit did not just hand us a “significant market shift,” then I do not know what one is. Few held the D.C. Circuit’s view of our now-circumscribed authority over broadband under Title I. Indeed, former Chairman Powell, when explaining the Commission’s classification of cable modem service as an “information service” in 2002 stated:

The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results. . . . There is no basis to conclude that Title I is inadequate to strike the right regulatory balance.<sup>3</sup>

One of the reasons the Commission felt comfortable classifying cable modem service as a Title I service is because it believed that under Title I, it had the ancillary authority necessary to serve as an appropriate backstop. When the D.C. Circuit handed down its *Comcast* decision, however, that view of the world was upended. The decision represented a tectonic shift under the foundation of our classification scheme.

But apart from mid-20<sup>th</sup> Century regulatory schemes and market movement, the most interesting argument being offered at the moment is the allegation that the Chairman’s proposal creates “regulatory uncertainty.”

At the outset, I feel compelled to point out the obvious, which is that there is no such thing as “certainty” in the regulatory context. Beyond constitutional constraints, certainty is just not a reality under any regulatory framework. Nothing in administrative law prevents the Commission from altering its course. And Congress can enact new legislation that completely undermines any existing framework. It might even do so in the near future. This is not a novel concept; regulations and their predicates come and go.

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<sup>2</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

<sup>3</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4867 (Sep. Stmt. of Chmn. Powell) (*Cable Modem Declaratory Ruling*), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Maybe the more accurate term then is regulatory predictability. That is, industry is searching for a reasonable probability that any one course will continue. Framing it this way at least recognizes the fact that any assumptions on which long-term investments are based have some non-zero chance of being undermined.

So that brings us to the question of whether Title I regulation offers a more predictable regulatory scheme than the Chairman's Title II hybrid approach. To be honest, I simply cannot see how Title I offers any greater predictability than Title II. Under the Chairman's proposal, we have both a clean process and, at worst, a colorable and straightforward argument in the courts. The process would result in a reclassification of broadband connectivity to a telecommunications service – with a strong side of forbearance – and thus allows us to implement key features of our Broadband Plan. Just one proceeding can satisfy a series of desired outcomes.

Title I, on the other hand, strikes me as completely unpredictable. We are coming off of a resounding blow to Commission authority under Title I, and are left only with a hodgepodge of long-shot attempts to cobble together just enough authority to accomplish our goals. Rather than just looking at one reclassification proceeding, we are now tangled in a web of Sections 254, 214, 706, 255, 256, and the list goes on. We are then left to explore, in separate proceedings, our authority to effectuate our goals in areas such as universal service, privacy, cyber security, transparency, public safety, access for those with disabilities, and the open Internet in distinct proceedings. It seems to me that the only predictability is that a large number of lawyers do not have to worry about their job security for some time to come.

That the Title I route itself is uncertain is not a novel concept. My good friend and colleague Commissioner Copps was prescient back in 2002 when dissenting from the Commission's declaratory ruling that cable modem service was an information service. He pointed out back then that the ruling "does not provide the certainty sought by these entities, instead placing cable modem services into the regulatory uncertainty of Title I."<sup>4</sup> As time has shown, he was right.

Perhaps then what some folks are concerned about is the fact that the Commission could go back on its word and eventually "unforbear" from applying some Title II requirements. If the Commission could simply unforbear as a matter of policy – say, under the Fox regime – perhaps then we would create regulatory unpredictability.

But that is not what we are dealing with. We are not talking about policy shifts under specific provisions under Title II. Rather, we would have to actually go through the painstaking process of "unforbearing" from applying any given provision of Title II. A process, I might add, that has never occurred in the 17 years since forbearance has been in effect. Never.

This raises an interesting and, in my view, illuminating point. Not only has the Commission never reversed a forbearance decision, but I have not heard anyone complain about this possibility in the wireless context. This is significant because the Chairman's classification proposal is nearly identical to the regulatory regime under which wireless voice services live today.

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<sup>4</sup> *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4870 (Dissenting Stmt. of Comm'r Copps).

In fact, all I have heard in the 10 months of my tenure – from Democrats and Republicans alike – is that the CMRS regime is responsible for the incredible investment and growth in the wireless sector. As we heard at the Commission meeting last month, under this regulatory framework, more than \$240 billion has been invested in our Nation’s wireless infrastructure from 1998 to 2008, including more than \$20 billion in 2008 alone.

Don’t just take my word for it, however. In recent filings with the Commission, Verizon argued:

Th[e Commission’s] light regulatory approach [to CMRS providers] has worked, most importantly by preserving the incentives for wireless providers to invest in their networks, knowing that their own competitive decisions will determine their success or failure.<sup>5</sup>

And that:

This limited regulatory approach led to explosive growth in innovation, competition, and investment in wireless networks, providing huge benefits to the national economy.<sup>6</sup>

Similarly, AT&T has recently noted:

The success of the wireless industry – over time and particularly today – has been made possible by the bipartisan commitment at the Commission and in Congress to permit the forces of competition and consumer demand to dictate the choices made available to consumers and to drive investment decisions.<sup>7</sup>

And T-Mobile posited that “the wireless market is as robust, open, and dynamic as it is today because the Commission took a deregulatory approach to the market early on, allowing competition to promote consumer welfare and drive innovation.”<sup>8</sup>

How is it that, on the one hand, these companies can praise the regulatory regime governing wireless, and on the other hand sound the alarm of “uncertainty” for a nearly identical framework proposed for broadband connectivity? The level of uncertainty should be, at worst, equal.

### **Congressional Action**

One uncertainty we can agree on, however, is the timing of Congressional action in this arena. As you know, the Chairmen of the relevant Congressional committees and subcommittees, issued a joint announcement declaring that Congress is beginning a process to update the Communications Act. I believe this undertaking is wise and is an

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<sup>5</sup> Letter from Steven E. Zipperstein, Vice President, Legal & External Affairs & General Counsel, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-66, at 145 (filed Sept. 30, 2009).

<sup>6</sup> Letter from Charla M. Rath, Executive Director - Spectrum and Public Policy, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-66, at 3 (filed June 30, 2009).

<sup>7</sup> Letter from Michael P. Goggin, AT&T, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-66, at 4 (filed Oct. 22, 2009).

<sup>8</sup> Letter from Thomas J. Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 09-66, at 33 (filed Sept. 30, 2009).

important process to keep our agency current with the rapid pace of the field we oversee. It has been almost 15 years since we last updated the Act, and the benefit of our experience over that time can help improve upon today's framework.

That being said, there is no doubt in my mind that we should move forward with the Chairman's plan while Congress ramps up its process. Indeed, the Committee Chairmen have told us as much. They have made clear that these processes can be complementary.

I am excited to work alongside Congress to get this right – to achieve a balance that fosters innovation and investment while protecting and empowering American consumers.

### **Conclusion**

So on we march. I have a feeling we will all be in touch considering the record-setting lobbying dollar figures that were recently announced for the first quarter. I guess in some sense I should be flattered – no one has ever spent that kind of money on me before.

Seriously, if I can leave you with any point today it would be this: I believe the Chairman has proposed a measured way in which to approach a difficult problem. It does not mark a return to traditional monopoly-era regulation. Rather, it addresses the curveball thrown our way by the Courts, and quite frankly recognizes that consumers have evolved in the way in which they engage their ISPs. But most of all, the idea of regulatory uncertainty seems to me to be largely misguided. There is no such thing as certainty in regulation.

It seems to me that industry has acknowledged and embraced this reality in the wireless context. The current wireless regulatory regime – fraught with the same level of predictability or unpredictability as what the Chairman is proposing for broadband – has been lauded time and time again. And, for better or worse, the Commission has held firm to that framework over time.

Thank you again to the Media Institute for inviting me and to all of you for coming and allowing me to share my thoughts on this combustible topic. I look forward to reading through the responses to the Commission's NOI, which lays out the various approaches to the problem left in our laps. I think that together we can arrive at a decision that meets each of our goals – maybe not 100 percent for everyone – but at least at a level that moves us forward as a Nation.